

NATIONAL DEFENSE UNIVERSITY

NATIONAL WAR COLLEGE

**RECOGNIZING WAR IN THE UNITED STATES  
VIA THE INTERAGENCY PROCESS**

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# RECOGNIZING WAR IN THE UNITED STATES

## VIA THE INTERAGENCY PROCESS

### Introduction

*“The Congress shall have Power . . . to declare war . . . and, to make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . .”*

- Constitution of the United States, Article 1<sup>1</sup>

*“The President shall be Commander in Chief . . . .”*

- Constitution of the United States, Article 2<sup>2</sup>

With these simple statements, the Constitution of United States grants the Congress the power to declare war and gives the President the role of Commander in Chief of the armed forces. In the 215 years since the Constitution was written, Congress has formally declared war only five times, while Presidents have committed U.S. forces under their authority as Commander in Chief countless additional times without any declaration of war. These commitments have sometimes created tension between the President and Congress, especially when troops are exposed to combat conditions akin to war. Events of the 20<sup>th</sup> Century only exacerbated this tension, and culminated in the enactment of the War Powers Act by Congress in 1973 in the aftermath of the Vietnam War. This act attempted to clarify and amplify the Constitutional roles of the President and Congress when the nation’s armed forces are committed to actual or potentially hostile or combat conditions. Despite enactment of the War Powers Act, tension between the Executive and Legislative branches

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<sup>1</sup> The Constitution of the United States, Article 1, Section 8.

<sup>2</sup> Ibid, Article 2, Section 2.

persists in many cases where the President orders the armed forces into action without a formal declaration of war or explicit approval by Congress. Given these issues, how can we determine when our nation is truly at war, and not simply just engaged in limited, short-term conflict? In the absence of a declaration of war, do other political mechanisms exist that confirm, in accordance with the Constitution, that the nation is indeed in a formal state of war? The answer lies, ironically, in an interagency process related to military pay and benefits - designation of a combat zone via Presidential Executive Order. This process seems to confirm the nation's wartime footing, and also satisfies the mutual desire of the President and Congress to reward America's men and women in uniform who are risking their lives under sustained combat conditions. Designation of an area of operations as a combat zone provides additional pay and benefits plus tax relief for our forces engaged in combat operations or subjected to hostile fire; it results from a fairly routine interagency coordination process. Since Congress and/or the President must formally approve the authority to grant combat pay and other benefits to our military men and women engaged in combat, the interagency process to approve these benefits may constitute de facto recognition that the nation is at war.

### **United States' Declared and Undeclared Wars**

Congress has formally declared war only five times in the history of the nation, first for the War of 1812, then again during the Mexican War (1846), the Spanish-American War (1898), World War I (1917), and World War II (1941). Since the end of World War II, the United States has clearly fought major wars in Korea, Vietnam, and the Persian Gulf without formal declarations of war by Congress, and engaged in hostilities in Grenada, Panama, Iraq, Somalia, the Balkans, and Afghanistan, among other places. During this period, Congress

has specifically authorized the use of force only for the Vietnam War, the deployment of U.S. forces to Lebanon in 1983, the Gulf War and ongoing operations in Afghanistan. President Truman did not seek Congressional approval prior to sending troops to Korea in 1950, and it was not until the Gulf of Tonkin resolution in August of 1964 that President Johnson received the go-ahead from Congress to involve the U.S. Armed Forces in Vietnam after several years of involvement in that nation already.<sup>3</sup> Opposition to that war, and the desire to reign in what some viewed as unchecked Presidential authority, led to the passing of the War Powers Act of 1973.

### **The War Powers Act of 1973**

*“It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.”*

- War Powers Act of 1973<sup>4</sup>

On November 7, 1973, Congress enacted the War Powers Resolution over President Nixon's veto, who declared it both unconstitutional and not in the best interests of the nation. The purpose of the resolution was to help ensure that the President and Congress share in making decisions about the commitment of U.S. troops in the absence of a declaration of war. Under its terms, the President can only commit forces into potentially hostile situations under three conditions: 1) a declaration of war, 2) specific statutory authorization, or 3) a

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<sup>3</sup> Southeast Asian (Gulf of Tonkin) Resolution, August 10, 1964.

<sup>4</sup>Public Law 93-148, *War Powers Resolution*, 93rd Congress, November 7, 1973

national emergency created by attack upon the United States, its territories or possessions, or its armed forces.<sup>5</sup>

According to the act, absent a declaration of war or specific statutory authority, the President cannot commit troops to combat or in an area of imminent hostilities abroad for more than 60 days without specific Congressional authorization to do so. The commitment can be extended for an additional 30 days if the President certifies that it is necessary to ensure the safe withdrawal of troops. Congress could terminate unauthorized troop commitments prior to the expiration of the 60-day deadline by passing a concurrent resolution, which does not require the President's signature to take effect. The War Powers Act urges the President to consult with Congress in every instance before committing troops and requires the President to report regularly in writing on the status of operations.<sup>6</sup> Every President since that time has taken the position that the War Powers Act is unconstitutional, but all have generally complied with the reporting requirements just the same.

Congress has authorized the use of force under the War Powers Act provisions only three times since it was enacted. These instances consist of a resolution supporting the Multinational Force in Lebanon in 1983, one authorizing the use of military force against Iraq in the Gulf War in 1991, and the latest legislation permitting the use of military force in response to the terrorist attacks of September 11, 2001. There are also many instances since the War Powers Act was enacted where the President has committed U.S. troops without specific authorization by Congress. The 1983 invasion of Grenada, the 1986 air strikes

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<sup>5</sup>Ibid.

<sup>6</sup> Ibid.

against Libya, the invasion of Panama in 1989, combat operations in Somalia in 1992-3, troop deployments to Haiti in 1993, the 1993 air strikes and 1995 troop deployments in Bosnia, the 1998 air strikes against Sudan and Afghanistan, and troop deployments and air strikes in Kosovo and Serbia in 1999 are all illustrative of this exercise of Presidential power to place American forces in action. In each case, with the exception of Kosovo air strikes in 1999, the requirement for the President to notify and consult with Congress under the War Powers act was generally complied with. Also, most of these operations were completed within the timetables established by the War Powers Act and thus compliance was not a major issue. During the Kosovo air strikes in 1999, however, the 60-day deadline for terminating the use of U.S. armed forces passed without additional Congressional authorization for continued employment of those forces. Several members of the Republican-controlled Congress submitted legislation to exert more legislative control over the air war to no avail. A majority of the House of Representatives voted against a declaration of war, against withdrawal from the war, against requiring congressional approval for the employment of ground forces, and, in a 213-213 tie vote, against a resolution in support of the air war. House leaders then gave the Pentagon twice as much money as it requested to pay for the Kosovo air operations. The Senate debated and then tabled a resolution authorizing the use of ground forces. A number of representatives even filed suit in federal court seeking a declaration that continuing the air strikes was a violation of the Constitution and the nation's laws. It went nowhere. The lack of progress on any of these issues and the subsequent legislative inaction allowed President Clinton to continue

prosecuting the war as the administration saw fit.<sup>7</sup> The question of what constitutes “war” under the War Powers Act remained unresolved.

**Does Declaration of a Combat Zone Constitute Formal Recognition  
that a State of War Exists?**

This raises a central question; in the absence of a declaration of war, are there other political mechanisms that exist that may confirm that the nation is indeed in a formal state of war? The answer lies in an interagency process related to military pay and benefits - designation of a combat zone via Presidential Executive Order. A review of combat zones authorized via Executive Order since World War II appears to confirm that the nation is indeed on a wartime footing at the time, albeit the primary purpose is to reward our fighting men and women in uniform who are risking their lives under sustained combat conditions. Designation of an area of operations as a combat zone provides additional pay and benefits plus tax relief for our forces engaged in combat operations or subjected to hostile fire; it results from a fairly routine interagency coordination process.

How does the interagency process work to identify and declare a combat zone? A combat zone is defined in U.S. Code, Title 26, Section 112 as:

*“Any area which the President of the United States by Executive Order designates, for purposes of this section or corresponding provisions of prior income tax laws, as an area in which Armed Forces of the United States are or have (after June 24, 1950) engaged in combat.”*<sup>8</sup>

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<sup>7</sup> Robert L. Borosage, “A ‘Splendid Little War’ Collides with the War Powers Act,” Los Angeles Times, May 23, 1999.

<sup>8</sup> U.S. Code, Title 26, Section 112, paragraph (c)(2).



While clearly concerning U.S. forces engaged in combat, Title 26 is the part of U.S. public law that deals with the Internal Revenue Code and thus pertains primarily to pay and tax benefits for Armed Forces operating within a combat zone. The issuing of an Executive Order by the President is the culmination of an interagency process that is initiated by the Commanders of the Unified Combatant Commands, then coordinated throughout the Department of Defense and the Executive Branch before going to the President for approval.

### **The Interagency Process to Recognize a Combat Zone**

According to Department of Defense Instruction 1340.9, “*Special Pay for Duty Subject to Hostile Fire or Imminent Danger*,” the Commanders of the Unified Combatant Commands with geographic responsibility have the primary duty to submit requests for area designations to the Chairman of the Joint Chiefs of Staff. The Chairman then reviews the request, and if approval is recommended, forwards the request to the Assistant Secretary of Defense (Force Management and Personnel) (ASD/FM&P).<sup>9</sup> The ASD/FM&P then prepares a draft Presidential Executive Order and submits a coordination package to the Legislative Referral Service in the Secretary of Defense’s Office of General Counsel for staffing throughout the Department of Defense.<sup>10</sup> Once completed, and if approved by the Secretary of Defense, the proposed Executive Order and supporting documents are submitted to the Office of Management and Budget (OMB), who is then responsible for coordinating the proposal with all other Executive Branch departments and agencies as appropriate. When OMB completes

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<sup>9</sup> Department of Defense Instruction 1340.9, *Special Pay for Duty Subject to Hostile Fire or Imminent Danger*, April 10, 1992, pp 2-3.

<sup>10</sup> Interview with Ms. Nina Fountain, Office of the Assistant Secretary of Defense (Force Management & Policy), January 14, 2002.

coordination and approval at this level, the Executive Order is finally ready for White House review and Presidential signature.<sup>11</sup>

Since World War II, five areas have been identified as combat zones. On December 20, 1950, President Harry Truman signed an Executive Order designating Korea as a combat zone, retroactive to June 27, 1950.<sup>12</sup> It was terminated on January 31, 1955 by Executive Order 10585, signed on January 1, 1955.<sup>13</sup> On April 24, 1965, President Lyndon Johnson signed Executive Order 11216, which designated the Vietnam area as a combat zone retroactive to January 1, 1964<sup>14</sup> and remained in effect until President Clinton signed Executive Order 13002 terminating it on June 30, 1996.<sup>15</sup>

During the Gulf War, Executive Order 12744 identified the Arabian Peninsula area as a combat zone beginning January 17<sup>th</sup>, 1991. This order included the land, sea, and air space of the Persian Gulf, the Red Sea, the Gulf of Oman, part of the Arabian Sea, the Gulf of Aden, as well as the total land area of Iraq, Kuwait, Saudi Arabia, Oman, Bahrain, Qatar, and the United Arab Emirates.<sup>16</sup> It remains in effect.

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<sup>11</sup> Interview with Mr. Paul D'Amato, Legislative Referral Service, Office of the Secretary of Defense, General Counsel, January 14, 2002.

<sup>12</sup> Presidential Executive Order 10195, *Designation of Korea and Waters Adjacent Thereto as a Combat Zone for the Purposes of Section 22(b)(13) of the Internal Revenue Code*, December 20, 1950.

<sup>13</sup> Presidential Executive Order 10585, *Designating the Date of Termination of Combatant Activities in Korea and Waters Adjacent Thereto*, January 1, 1955.

<sup>14</sup> Presidential Executive Order 11216, *Designation of Vietnam and Waters Adjacent Thereto as a Combat Zone for the Purposes of Section 112 of the Internal Revenue Code of 1954*, April 24, 1965.

<sup>15</sup> Presidential Executive Order 13002, *Termination of Combat Zone Designation in Vietnam and Waters Adjacent Thereto*, May 13, 1996.

<sup>16</sup> Presidential Executive Order 12744, *Designation of Arabian Peninsula Area, Airspace, and Adjacent Waters as a Combat Zone*, January 21, 1991.

During operations in Kosovo in 1999, Executive Order 13119, signed by President Clinton on April 13, 1999 and retroactive to March 24 of that year, designated the land, sea and air space of the Federal Republic of Yugoslavia (Serbia/Montenegro), Albania, the Adriatic Sea, and parts of the Ionian Sea as a combat zone.<sup>17</sup> In parallel, Congress designated the same area under Public Law 106-21 on April 19 as a “Qualified Hazardous Duty Area,” which authorized additional pay and benefits for uniformed personnel in the area.<sup>18</sup> Both still remain in effect today. In a side note, Congress previously declared parts of the former Yugoslavia (Bosnia and Herzegovina, Croatia and Macedonia) as a Qualified Hazardous Duty Area under Public Law 104-117 on March 20, 1996, which was retroactive to November 21, 1995 and also remains in effect today.<sup>19</sup> There was no combat zone ever declared by Executive Order for these operations.

The sum of these Executive Orders identifying combat zones, along with Congressional resolutions authorizing the use of force, bring us to near unanimity on what constitutes formal recognition that a state of war exists for the United States in the years since World War II. For the Korean War, the Vietnam War, the Persian Gulf War, and the current campaign in Afghanistan, all were conducted with Congressional resolutions authorizing the use of force along with Executive Orders declaring combat zones in the respective areas of operations. The only anomaly remains the air war over Kosovo in 1999, where no Congressional authorization existed despite declaration of a combat zone by Presidential

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<sup>17</sup> Presidential Executive Order 13119, *Designation of Federal Republic of Yugoslavia, (Serbia/Montenegro), Albania, the Airspace Above, and Adjacent Waters as a Combat Zone*, April 13, 1999.

<sup>18</sup> Public Law 106-21, 106th Congress, April 19, 1999.

<sup>19</sup> Public Law 104-117, 104th Congress, March 20, 1996.

Executive Order. It should be noted, however, that Congress recognized the area as a Qualified Hazardous Duty Area under separate legislation, a tacit recognition that combat operations were being conducted. None of the other military operations conducted since World War II bear these similarities, and the American public consensus is that none of them constituted a “war” in the classic sense. Presumably, the jury on the air war over Kosovo remains hung.

In conclusion, the mechanisms still exist for Congress to declare war and for the President to commit U.S. armed forces per their Constitutionally granted powers, as refined and clarified within the provisions of the War Powers Act of 1973. When it comes to recognizing the sacrifices of our uniformed personnel engaged in combat operations, it seems evident that the declaration of a combat zone via the interagency process is additional confirmation that the nation is, indeed in a state of war even when a formal declaration has not occurred.

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- <sup>2</sup> Constitution of the United States, 1787.
- <sup>3</sup> Department of Defense Directive 5500.1, *Preparation and Processing of Legislation, Executive Orders, Proclamations, and Reports and Comments Thereon*, May 21, 1964.
- <sup>4</sup> Department of Defense Instruction 1340.9, *Special Pay for Duty Subject to Hostile Fire or Imminent Danger*, April 10, 1992.
- <sup>5</sup> Interview with Ms. Nina Fountain, Office of the Assistant Secretary of Defense (Force Management & Policy), January 14, 2002.
- <sup>6</sup> Interview with Mr. Paul D’Amato, Legislative Referral Service, Office of the Secretary of Defense, General Counsel, January 14, 2002.
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- <sup>12</sup> Presidential Executive Order 13119, *Designation of Federal Republic of Yugoslavia, (Serbia/Montenegro), Albania, the Airspace Above, and Adjacent Waters as a Combat Zone*, April 13, 1999.
- <sup>13</sup> Presidential Executive Order 13239, *Designation of Afghanistan and the Airspace Above as a Combat Zone*, December 12, 2001.
- <sup>14</sup> Public Law 93-148, *War Powers Resolution*, 93rd Congress, November 7, 1973
- <sup>15</sup> Public Law 102-1, *Authorization for Use of Military Force Against Iraq Resolution*, 101st Congress, January 12, 1990.

<sup>16</sup> Public Law 104–117, 104th Congress, March 20, 1996.

<sup>17</sup> Public Law 106-21, 106th Congress, April 19, 1999.

<sup>18</sup> Senate Joint Resolution 23, September 14, 2001.

<sup>19</sup> Southeast Asian (Gulf of Tonkin) Resolution, August 10, 1964.